Re LAI AH SEN (m.w.)

[O.C.J. (Spenser Wilkinson J.) September 3, 1954]

[Penang — Bankruptcy No. 17 of 1954]

Bankruptcy — Married woman — Receiving order — Whether can be made without proof of her having separate property — Jurisdiction of Court to entertain petition — Former Unfederated Malay States laws — Bankruptcy (Transitional Provisions) Ordinance, 1946, provisions — Applicability of former Federated Malay States laws in former Unfederated Malay States — Procedure — Meaning of "powers".

This was a Bankruptcy Petition filed by a creditor of a married woman residing in the State of Kedah who had neither herself nor through any agent carried on business within the previous year anywhere within the Settlement of Penang. There was no specific evidence as to where she was domiciled, but in the absence of any evidence to the contrary, it was assumed that she was domiciled in Kedah. Two questions arose from the circumstances of the case: (a) whether a receiving order could be made against a married woman without proof that she had some separate property; (b) whether the High Court sitting in Penang, had jurisdiction to entertain the Petition.

Held: (1) where a married woman contracts a debt or takes other steps which result in a judgment being taken against her she has to some extent held herself out as possessing at least some assets and, therefore, unless there is positive evidence that she has none, a receiving order can be made; (2) if the creditor has complied with all the rules and presented a Petition in the prescribed form properly verified he is entitled to have his Petition heard. If the debtor then opposes the Petition on the ground that she has no separate property then, if the Court is satisfied that this is so, the Petition will be dismissed.

Held further: (1) there is no difficulty in the way of the High Court, sitting in Penang, applying the bankruptcy law appropriate to the Malay States to a resident of the Malay States under s. 3 of the Bankruptcy (Transitional Provisions) Ordinance, 1946, but if the matter is heard physically in the Settlements then the procedure is to be the same as under the existing laws of the Straits Settlements; (2) s. 47 of the Courts Ordinance, 1948, and para 3 of the Schedule thereto give jurisdiction to the High Court in respect of the whole Federation "under any written law for the time being in force relating to bankruptcy." This gives the High Court unfettered jurisdiction under both the Bankruptcy Enactment of the Federated Malay States and the Bankruptcy Ordinance of the Straits Settlements wherever in the Federation it may happen to be sitting; (3) the position in Kedah is that by the Bankruptcy (Transitional Provisions) Ordinance, 1946, the provisions of the Bankruptcy Enactment of the Federated Malay States were extended to the State of Kedah. The debtor having failed to comply with the bankruptcy notice, the Court, therefore, has jurisdiction to make receiving and adjudicating orders under the Petition.

Cases referred to:—

(1) *Re Cheong Yuk Sim* (1954) M.L.J. 129 not followed.

(2) *Re Lim Quee Geok* (1935) M.L.J. 3.

BANKRUPTCY PETITION.

Marcus Knorpel for the petitioning creditor.

Balwant Singh (Asst. Official Assignee) for the Official Assignee.

Cur. Adv. Vult.

Spenser Wilkinson J. : — This is a Bankruptcy Petition filed by a creditor of a married woman, who at present resides and apparently has always resided in Kulim in the State of Kedah and has neither herself nor through any agent carried on business within the past year anywhere within the Settlement. There is no specific evidence as to where she is domiciled, but in the absence of any evidence to the contrary I assume that she is domiciled in Kedah. Two questions arise from the circumstances of the case: one is whether a receiving order can be made against a married woman without proof that she has some separate property; and the second is whether the High Court has jurisdiction to entertain the Petition. As the question of jurisdiction is fundamental I will deal with this point first.

Mr. Knorpel, who appeared for the petitioning creditor, very properly cited to me the recent case of *Re Cheong Yuk Sim (f)*[1] decided by Thomson J. in Ipoh in respect of a debtor who had at all material times been domiciled and resident in Penang. Mr. Knorpel sought to distinguish that case on the ground that Thomson J. had been careful to point out that he was not concerned with the position of the former Unfederated Malay States including Kedah. Another point of difference suggested was that the present case deals with a former Unfederated Malay State, in which prior to 1946 there was no bankruptcy law of any kind. In view of these differences I think the position is that I am not strictly bound by the Ipoh decision in the present case, though the opinions expressed therein should be given the greatest possible weight and respect.

After dealing exhaustively with the relevant provisions of the Bankruptcy (Transitional Provisions) Ordinance, 1946 and expressing his views thereon the learned Judge in the last paragraph but four of his judgment in that case sums up his view of the present position in the former Federated Malay States as follows:—

"This Court has jurisdiction throughout the Federation. In the former F.M.S., however, the law to be applied is the former F.M.S. Enactment (Cap. 55) subject to certain modifications which do not affect the argument, and in the former F.M.S. the procedure and powers of the Court are the same as under that Enactment. Similarly in the Settlements of Penang and Malacca the law to be applied is the former Colony Ordinance (Cap. 45) and the procedure and powers of the Court are the same as under that Ordinance. There is nothing in the F.M.S. Enactment which makes what I have called a Colony statutory debtor subject to it . . . . . ."

So far I find myself, with respect, in complete agreement with the learned Judge; but the rest of the paragraph reads:—

". . . . . and there is nothing in it which gives the Court powers to entertain bankruptcy proceedings against such a debtor except of course in the case where he is also an F.M.S. statutory debtor. In the F.M.S. the Court only has jurisdiction, in the sense of power, in the case of an F.M.S. statutory debtor."

Were it not for the provisions of the Courts Ordinance 1948 I would be inclined, as a matter of convenience, to follow this construction of the 1946 Ordinance in spite of any different views I might have had. But it looks from the report as though the material provisions of the Courts Ordinance 1948 were not drawn to the attention of the learned Judge and it appears from his judgment that he did not consider the effect of these provisions. I feel, therefore, that I ought to express my views on the whole question, with particular reference to the Courts Ordinance, 1948.

In the first place it appears to me that the provisions of the Bankruptcy (Transitional Provisions) Ordinance 1946 (which I shall hereinafter refer to as the 1946 Ordinance) are to some extent ambiguous. Section 3 lays down that the laws to be applied in bankruptcy shall be "in the Settlements" the existing laws of the Settlements and "in the Malay States" the existing laws of the Federated Malay States, while Section 5 provides that the procedure and powers of the Court under its jurisdiction in bankruptcy shall "in the Settlements" be the same as the existing laws of the Straits Settlements and "in the Malay States" be the same as under the existing laws of the Federated Malay States.

Section 4 of the same Ordinance reads as follows:—

"4. (1) The Supreme Court shall be the Court having jurisdiction in bankruptcy in the Union under this Ordinance.

(2) The petition shall be presented to the Court in the Settlement or State in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition.

(3) Nothing in this Section shall invalidate a proceeding by reason of its being taken in a wrong Settlement or State.

(4) Any proceeding in bankruptcy may at any time and at any stage thereof, either with or without the application of any of the parties thereto, be transferred by a Judge of the Court from one Settlement to another Settlement, or from one State to another State, or from a Settlement to a State, or from a State to a Settlement, or may be retained in the Court in the Settlement or State in which the proceeding commenced, notwithstanding that such Court may not be the Court in which the proceedings ought to have been commenced."

Mr. Knorpel relied particularly on sub-section (3) and the powers of transfer contained in sub-section (4) of this Section, but I do not think these provisions can help him if the jurisdiction conferred by sub-section (1) is limited by the provisions of Sections 3 and 5. It appears to me, as I have said, that the provisions of these two Sections are ambiguous and are capable of two alternative constructions. The expressions "in the Settlements" and "in the Malay States" in Section 3 can, I think, be read either as referring to the Settlement or State to which the law is to be applied or to the geographical position of the Court which applies the laws. The first construction would, it seems to me, be more in accordance with the general provisions of the Courts Ordinance, 1946 and to the continuance of the existing laws by Section 87 of the Malayan Union Order in Council.

The whole scheme of the Courts Ordinance 1946, which contains the same definition of "Existing Laws" as is contained in the Malayan Union Order in Council, was to give the High Court the jurisdiction, sitting anywhere, of all the previously existing Courts of High Court level. This was done by Sections 11 and 12 and the Second Schedule. The substantive law of each State and Settlement remained what it was and wherever the High Court might sit it applied the law applicable to the matter before it. The only geographical restriction imposed was by Section 34 which laid down that the procedure in the Settlements was to be the old Straits Procedure and in the Malay States the old Federated Malay States procedure. I think the 1946 Ordinance was intended to implement the same scheme in respect of bankruptcy, not to make an exception to it. In other words I think Sections 3 and 5 were intended to be declaratory rather than to effect a change in the law as laid down only three months earlier in the Courts Ordinance, 1946. The provisions of Section 5 were necessary in regard to the former Unfederated Malay States, but in regard to the former Federated Malay States the old procedure was already in force as part of the "existing laws".

In Section 5 the same words "in the Settlements" and "in the Malay States" must, I think, in the context be intended to be geographical. "The procedure . . . . . of the Court . . . . . in the Settlements" must mean, I think, the procedure of the Court when sitting in the Settlements, as it does in Section 34(1) of the Courts Ordinance 1946. Although one normally endeavours to give the same meaning to the same words where they appear in different parts of the same Ordinance I think the contexts of the two Sections and a consideration of the state of the law when the Ordinance was passed are sufficient to justify departure from this general rule in the present case. I can see no difficulty in the way of the High Court, sitting in Penang, applying the bankruptcy law appropriate to the Malay States to a resident of the Malay States under Section 3, but if the matter is heard physically in the Settlements then the procedure is to be the same as under the existing laws of the Straits Settlements.

The only difficulty I can see in adopting this construction is the use of the word "powers" in Section 5. I do not think, however, it is possible to construe the expression "procedure and powers" as meaning "procedure and jurisdiction", and in my view "powers" in this context means procedural powers such as issuing process, compelling attendance of witnesses or arresting debtors and so on. The same word is used in Sections 61 and 80 of the Courts Ordinance 1948 and is clearly there used in the sense of powers to be used in the course of exercising jurisdiction.

For these reasons I should have been inclined to construe the 1946 Ordinance as giving jurisdiction to the High Court whether sitting in Penang or elsewhere to entertain a Bankruptcy Petition under the Bankruptcy Enactment against what I might call a Malay State statutory debtor.

If it is wrong so to construe Sections 3 and 5 of the 1946 Ordinance then I think the position was fundamentally altered by the Courts Ordinance 1948. By Section 47 of that Ordinance and paragraph 3 of the Schedule thereto jurisdiction is given to the High Court "in respect of the whole Federation" "under any written law for the time being in force relating to bankruptcy". This appears to me plainly to give the High Court unfettered jurisdiction under both the Bankruptcy Enactment of the Federated Malay States and the Bankruptcy Ordinance of the Straits Settlements wherever in the Federation it may happen to be sitting. In so far, therefore, as Section 3 of the 1946 Ordinance can be construed so as to detract from that unfettered jurisdiction then I think there is inconsistency or conflict between the provisions of that Section and the provisions of the 1948 Ordinance and by Section 109 and the latter Ordinance it is provided that the provisions of the Courts Ordinance 1948 shall prevail.

I think the position is somewhat analogous to that in regard to civil suit. Subject to the power of the Court to stay proceedings under paragraph 2 of the Third Schedule of the Courts Ordinance, 1948, an action in the High Court can be commenced anywhere in the Federation wherever the plaintiff or the defendant may be and wherever the course of action arose; but whatever may be the procedure to be adopted the law to be applied will be the law of the particular State or Settlement where the course of action arose or to which the contract is held to be subject or where the land in question is situated as the case may be. As the foundation of the Court's jurisdiction in bankruptcy under either of the two laws is the definition of a debtor and as the same acts are acts of bankruptcy under both Ordinance and Enactment, where the debtor is what Thomson J. has called a Colony statutory debtor then I think the matter is one in respect of the Settlements and the Settlement Bankruptcy Ordinance is applicable, and where the debtor is what I have called a statutory Malay State debtor the matter is one in respect of a Malay State and the law applicable is the Federated Malay States Enactment.

The position in Kedah is that by the 1946 Ordinance the provisions of the Bankruptcy Enactment of the Federated Malay States were extended to the State of Kedah. The debtor in the present case is clearly a debtor within the definition contained in the Federated Malay States Enactment and she has failed to comply with a bankruptcy notice. In my opinion, therefore, this Court applying the law applicable to this case, which is the Bankruptcy Enactment, has jurisdiction to make receiving and adjudicating orders under this Petition, and I so hold.

Then comes the question of procedure. The Assistant Official Assignee suggested that the Petition being headed "Bankruptcy Ordinance (Chapter 45)" was in the wrong form and that it should be in the form laid down in the Federated Malay States rules. But the words "Bankruptcy Ordinance (Chapter 45)" at the top of the Petition are not part of the statutory form — either the form laid down for a Petition or the prescribed form of General Heading — and are in fact quite unnecessary. Moreover, just as in civil suits the procedure of the High Court when sitting in Penang is the old Straits Settlements procedure except in so far as it has been specifically amended, so in Bankruptcy the procedure of the Court is the old Straits Settlements Bankruptcy procedure. In any event, as the form of Bankruptcy Petition laid down is precisely the same under the Bankruptcy Enactment and Ordinance — indeed the Government printed form, Courts 409, is for use in either the States or the Settlements — this point is purely academic. In the former Federated Malay States and in the Settlements respectively the pre-war civil procedure has substantially continued as it was. In regard to the former Unfederated Malay States provision for the procedure in civil suits has been made either by the East Coast Rules or by an extension of the former Federated Malay States procedure: in Bankruptcy a similar effect has been obtained by the extension under Section 5 of the 1946 Ordinance of the Federated Malay States procedure to the former Unfederated Malay States.

In the present case, therefore, so long as the proceedings are retained in Penang the procedure will be as laid down in the Straits Bankruptcy Rules and if the proceedings are transferred to Kedah the procedure will be governed by the Bankruptcy Enactment and the rules made thereunder.

It now becomes necessary to decide whether a receiving order can be made against a married woman without proof that she has separate property. Mr. Knorpel referred me to the case of *Lim Quee Geok (m.w.)*[2]. In that case Murison C.J. delivered a short oral judgment as follows :—

"I think the words 'if any' (in Section 117 of Ordinance No. 44) mean that it must be proved that the debtor had some assets. I have no such evidence. The petition is therefore refused with costs."

Mr. Knorpel, I think rightly, pointed out that this judgment really went further than the facts of the case warranted, because in that case the debtor gave evidence to the effect that she had no separate property. I have no doubt that where there is positive evidence as there was in *Lim Quee Geok's* case that a married woman has no separate property a receiving order would not be made. This is very different, however, from the proposition that there must be affirmative evidence that the debtor has property before she can be made a bankrupt.

I am inclined to think that where a married woman contracts a debt or takes other steps which result in a judgment being taken against her she has to some extent held herself out as possessing at least some assets and that, therefore, unless there is positive evidence that she has none, a receiving order can be made. Apart from this, however, the Ordinance and Rules lay down precisely what is to be stated and verified in a Petition. It is nowhere laid down that in the case of a married woman the Petition shall allege that she is possessed of separate property. In my opinion, therefore, if the creditor, as he has in this case, has complied with all the rules and presented a Petition in the prescribed form properly verified he is entitled to have his Petition heard. If the debtor then opposes the Petition on the ground that she has no separate property then, if the Court is satisfied that this is so, the Petition will be dismissed.

In this case, if I am satisfied as to service, I shall make receiving and adjudicating orders against the debtor and then consider the question of transfer of the proceedings.

Order accordingly.

Solicitors : *Lim, Lim & Oon.*

T. CHELLIAH v. LAXMAN SINGH & ANOR.

[O.C.J. (Spenser Wilkinson J.) September 13, 1954]

[Penang — Consolidated Civil Suit No. 189 of 1953 & Butterworth Sessions Courts Civil Action No. 6 of 1953]

Bills of Sale Ordinance — Document which is not on the face of it a bill of sale — Court can go behind document to ascertain exact nature of document — Sale of Goods Act, s. 21 — Application of, where buyer has no better title than seller has — Moneylenders Ordinance, 1951, ss. 15 & 16.

The subject matter of this case concerned 2 houses which were of a type considered by custom of this country to be movable property. The plaintiff, who was the owner of the 2 houses, executed a document dated May 26, 1952 purporting to sell them in consideration of $1,000 free from encumbrances to the 1st defendant. The 1st defendant in turn by a similar document dated January 5, 1953 purported to transfer the same houses in consideration of $1,350 free from all encumbrances to the 2nd defendant.

The plaintiff contended that although the document he executed was in form an out and out sale of property, the actual bargain between the parties was a loan transaction. The plaintiff further contended that the second document was void under s. 5(2) of the Bills of Sale Ordinance because at the time it was made the grantor (1st defendant) was not the true owner of the property. Finally the plaintiff contended that the 1st defendant was a moneylender and therefore the contract between him and the 1st defendant was unenforceable because the 1st defendant was unlicensed.

Held: the first document was an actual loan transaction and therefore the second document was void. Insofar as the 2nd defendant was concerned s. 21 of the Sale of Goods Act applied, (**Wok binte Hussain v. Harchand Singh**[1] followed).

Held further: the first document was also unenforceable under the Moneylenders Ordinance and therefore repayment of the amount due in respect of the loan was not a condition which would be imposed upon the plaintiff in obtaining the return of his security, (**Palanisamy Servai v. S. V. Lingham**[3] followed).

Cases referred to :—

(1) *Wok binte Hussain v. Harchand Singh* (1953) M.L.J. 176.

(2) *Burkinshaw v. Nicolls* 3 A.C. 1004.

(3) *Palanisamy Servai v. S. V. Lingham* (1954) M.L.J. 145.

CIVIL SUIT.

Eusoffe Abdoolcader for the plaintiff.

Jag-Jit Singh for the 1st defendant.

R. D. Hume for the 2nd defendant.

Cur. Adv. Vult.

Spenser Wilkinson J. : — The dispute in this case concerned two houses in Butterworth and it was common ground that the houses are of a type which by the custom of this country are movable and not immovable property, and my decision in this case proceeds upon this basis.